Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

VILLAGE OF LAKE BARRINGTON, an Illinois Municipal Corporation, VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE, NANCY SMITH and JAMES P. BATEMAN,

Cross-Petitioners,

v.

MARY E. HOGAN, COLE TAYLOR BANK, as Trustee Under Trust No. 77-432 dated December 19, 1977, SAM LOIACONO, RUTH LOIACONO, and LAKE BARRINGTON INDUSTRIAL PARK ASSOCIATION,

Cross-Respondents.

On Cross-Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Illinois Appellate Court improperly refused to clothe Cross-Petitioner, Lake Barrington Village Attorney, James P. Bateman, with official, qualified immunity.

A. Whether, in the first instance, the Petitioners/Cross-Respondents adequately pleaded the deprivation of their right to petition the Court for redress of grievances.

B. Whether, in refusing to extend official immunity to Cross-Petitioner, Lake Barrington Village Attorney James P. Bateman, the Illinois Appellate Court erred by applying a subjective test, as opposed to a purely objective one, in contravention of this Court's decision in *Harlow v. Fitzgerald*.

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to the proceedings in the Appellate Court of Illinois.

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CROSS-PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Order of the Circuit Court of Lake County, Illinois granting the Cross-Petitioners' Motion to Dismiss Count I of the First Amended Counter-Complaint and Third-Party Complaint for money damages (brought under 42 U.S.C. §1983) on the basis that the Village's Complaint constituted protected petitioning activity, under the

Noerr-Pennington doctrine, which did not constitute "sham" litigation, was entered on November 24, 1993, is unreported, and is reprinted at Page 27 of the Cross-Appendix to this Cross-Petition.

The Order of the Illinois Appellate Court, Second Judicial District, reversing the decision of the Circuit Court of Lake County, Illinois, was entered on May 2, 1995, is reported at 272 Ill. App. 3d 225, 649 N.E.2d 1366, 208 Ill. Dec. 705, and is reprinted at Pages 1 to 22 of the Petitioners' Appendix.

The Order of the Illinois Appellate Court, Second Judicial District, denying the Cross-Petitions of the parties for rehearing was entered on June 9, 1995, is unreported, and is reprinted at Page 23 of the Petitioners' Appendix.

The Order of the Illinois Supreme Court, denying the petition for leave to appeal was entered on October 4, 1995, is reported at 163 Ill.2d 560, 657 N.E.2d 623, 212 Ill. Dec. 422, and is reprinted at Page 24 of the Petitioners' Appendix.

JURISDICTIONAL STATEMENT

The Cross-Petitioner, Lake Barrington Village Attorney, James P. Bateman, invokes this Court's jurisdiction pursuant to 28 U.S.C. §1257. The Illinois Appellate Court, Second Judicial District, reversed the dismissal order entered by the Circuit Court of Lake County, Illinois, in favor of the Cross-Petitioner and that order reversing was entered on May 2, 1995. The Illinois Supreme Court denied the Cross-Petitions of the parties for leave to appeal on October 4, 1995. The Petitioners/

Cross-Respondents filed their petition for writ of certiorari within ninety days of the denial of the petition for leave to appeal in the Illinois Supreme Court.

The Cross-Petitioner received a petition for writ of certiorari on January 4, 1996. Pursuant to Supreme Court Rule 12.3, this Cross-Petition is timely, as it is filed within thirty days after receipt of the original petition for writ of certiorari.

Although 28 U.S.C. §1257 vests this Court with jurisdiction over appeals from only "final judgments or decrees" rendered by the highest court of a state in which a decision could be had, the Cross-Petitioner properly invokes the jurisdiction of this Court under the collateral order doctrine, as applied by this Court in *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806 (1985). This Cross-Petition raises only the question of the improper denial of official, qualified immunity, which is an immunity from suit and which is effectively lost if the case is erroneously permitted to go to trial. Therefore, the Illinois Appellate Court's decision, insofar as it refused to clothe the Cross-Petitioner, Lake Barrington Village Attorney, James P. Bateman, with official, qualified immunity, is a "final" decision within the meaning of 28 U.S.C. §1257. *Local No. 438 Construction and General Laborers' Union, AFL-CIO v. Curry*, 371 U.S. 542, 83 S.Ct. 531 (1963). The collateral order doctrine is applied not merely as a matter of procedure, but of substance, for the immunity would be extinguished if the case were erroneously permitted to go to trial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the People to peaceably assemble, and to petition the government for a redress of grievances.

35 ILCS §235/9 (1982).

Petition by 51 percent of electors of area—objection to district, enlargement of district, tax, etc.—subsequent proposals

9. If a petition signed by at least 51% of the electors residing within the special service area and by at least 51% of the owners of record of the land included within the boundaries of the Special Service Area is filed with the municipal clerk or county clerk, as the case may be, within 60 days following the final adjournment of the public hearing objecting to the creation of the special service district, the enlargement thereof, the levy or imposition of a tax or the issuance of bonds for the provision of special services to the area, or to a proposed increase in the tax rate, no such district may be created, enlarged, or tax may be levied or imposed nor the rate increased, or no such bonds may be issued. The subject matter of said petition shall not be proposed relative to any signatories of said petition within the next two years. Each resident of the special service area registered to vote at the time of the public hearing held with regard to such special service area shall be considered an elector. Each

person whose name legal title to land included within the boundaries of the special service area is held according to the records of the county wherein the land is located shall be considered an owner of record. Owners of record shall be determined at the time of the public hearing held with regard to a special service area. Land owned in the name of a land trust, corporation, estate or partnership shall be considered to have a single owner of record.

42 U.S.C. §1983

1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law; suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This litigation arises out of the creation of a Special Service Area within the Village of Lake Barrington, Illinois. The proposed project consists of the installation of a potable water line system to service the area, together with a water supply and storage system, certain drainage improvements, and a sanitary sewer collection sys-

tem in an area known as the Lake Barrington Industrial Park ("Park"). The Park does not have sewer or municipal water, but is served by separate well and septic systems. Presently, the lack of a municipal water supply severely hampers the ability of the fire department to fight fires within the Park. Over the past several years, the fire department has had to fight several significant fires within the Park. In several instances, despite best efforts by the fire department and as many as twelve neighboring departments, the fire department was unable to prevent the fires from causing total losses of buildings and contents. This is due primarily to the lack of a municipal water supply for the Park. As a result, the fire department is forced to tank in water for firefighting purposes. This alternative is much slower, and prevents the fire department from putting enough water on the fire in a quick enough response to have a meaningful effect on the fire. In the opinion of Fire Chief Steven Figved, the installation of a municipal water system through the Special Service Area will significantly improve the ability of the fire department to put out fires within the Park. The system would also provide property owners with the opportunity to install sprinkler systems within their buildings, with a potential for significant reduction in their insurance premiums.

After two informational meetings were held, the Village adopted its first ordinance, on July 7, 1992, which established a public hearing date of July 29, 1992. Notice of the hearing was published in the Daily Herald on July 13, 1992, and, notice of the hearing was also mailed, by both First-Class and by certified mail, to the person or persons in whose name the general taxes for the preceding year had been paid, based on information provided by the County Treasurer's Office.

Cross-Respondent Ruth Loiacono, one of two persons in whose names the taxes had been paid for a single parcel within the proposed Special Service Area, contended that she was not mailed the notice, but she did not ever suggest that she did not see the notice, that she was not aware of the public hearing, that she did not attend the public hearing, or that she was in any way prejudiced by the alleged failure to mail her the notice. The notice was sent to the Loiacono's, and was signed for by her husband, Sam Loiacono. Ruth Loiacono filed a timely statutory objection to the Special Service Area.

The public hearing was held on July 29, 1992. After the hearing was adjourned, certain objections were filed, including the objections of Cross-Respondents Mary E. Hogan, Sam Loiacono and Ruth Loiacono. However, the objections had no legal impact on the proceedings, as they were insufficient in number to aggregate 51 percent of the owners and registered voters to prevent the creation of the Special Service Area, the levy of taxes, and the sale of bonds, as required under applicable Illinois law—Section 9 of the Special Service Area Tax Act (35 ILCS 235/9 (1982)). (Only 46 out 127 owners of record filed objections, and, only two of five registered voters signed objections).

Ultimately, the Village adopted an ordinance on October 20, 1992, which established the Special Service Area, consisting of 100 separate parcels and 127 owners of record. The Village adopted an ordinance on November 17, 1992, which provided for the levy of taxes and sale of bonds in the aggregate amount of $7,000,000.00. The Village entered into an agreement with Bernardi Securities, Inc. for the sale of the bonds on November 17, 1992.

The sale of the bonds was never completed. The Village Attorney, James P. Bateman, received a series of communications from an attorney, James Hecht, who claimed to represent Cross-Respondent, Mary E. Hogan, and other undisclosed clients. During a December 3, 1992 telephone conversation, Hecht told Bateman that he was preparing a suit to enjoin the sale of the bonds. On December 9, 1992, during another telephone conversation, Bateman informed Hecht that his threat of litigation was holding up the bond sale closing, which had been set for December 14, 1992. This threatened litigation prevented the Village from closing on the sale of the bonds on December 14, 1992. On December 18, 1992, Bateman spoke on the telephone again with Hecht, who was told that his threat of litigation was interfering with the ability of the Village to close on the sale of the bonds, since the Village could not represent to bond counsel that there was no pending or threatened litigation. In that conversation, Hecht denied that he had threatened litigation. Bateman then sent a letter to Hecht on December 21, 1992, to confirm this statement.

On December 22, 1992, Bateman and bond counsel, Charles Hug, had a telephone conversation with Hecht, in which he refused to confirm his earlier denial that the Cross-Respondents had threatened or were threatening suit. The sale of the bonds never closed. The Village contends that the closing was prevented by the consistent threat of litigation by Hecht, on behalf of Mary E. Hogan and certain other, undisclosed clients.

The Village of Lake Barrington has expended in excess of $645,568.00 for the proposed Special Service Area, including $396,681.00 for engineering services and $96,366.00 for administrative services and costs.

On January 5, 1993, the Village of Lake Barrington filed suit against Mary E. Hogan, Sam Loiacono, Ruth Loiacono, and other unknown owners. The Village's Complaint was dismissed by the Circuit Court, but the Village filed an Amended Complaint consisting of three counts, pursuant to leave of court. Count I sought a declaration of the validity of the Special Service Area ordinances. Count II was a claim for tortious interference with contract, and Count III was a claim for tortious interference with prospective advantage. The Circuit Court dismissed Counts II and III of the Village's amended complaint with prejudice.

The Cross-Respondents then filed a two-count Counter-Complaint and Third-Party Complaint, with both counts being brought under 42 U.S.C. §1983 for damages for alleged violation of their First Amendment right to petition and for violation of their rights protected under the equal protection clause of the Fourteenth Amendment. Ultimately, the Circuit Court dismissed the Cross-Respondents' First Amendment claim, as alleged in Count I of their First Amended Counter-Complaint, and, the Circuit Court later entered summary judgment in favor of the Cross-Petitioners on the equal protection claim. Although Village Attorney Bateman had filed his motion to dismiss the Cross-Respondents' First Amended Counter-Complaint and Third-Party Complaint on the basis of official, qualified immunity, the Circuit Court, in dismissing the Cross-Respondents' First Amendment claim, never addressed the issue of Attorney Bateman's entitlement to official, qualified immunity from suit brought under 42 U.S.C. §1983. The Cross-Respondents also filed a separate Counter-Complaint in which they sought a declaration that the Special Service Area ordi-

nances were invalid. On March 30, 1994, the Circuit Court entered summary judgment in favor of the Cross-Respondents on their action for declaratory relief, with the Circuit Court finding that the notice mailed by the Village did not satisfy the applicable statute for service upon individual owners, and the Circuit Court found that the notice was insufficient in content, without specifying any particular defect.

On cross-appeals by the parties, the Appellate Court affirmed, in part, and reversed, in part. At issue in this Cross-Petition is Count I of the Cross-Respondents' First Amended Counter-Complaint and Third-Party Complaint for deprivation of their First Amendment right to petition the court for redress of grievances. In Count I, the Cross-Respondents alleged that, at some time prior to December 9, 1992, Attorney Hecht advised Village Attorney Bateman that a suit would be filed to contest the validity of the Special Service Area ordinances, and that, thereafter, Mr. Bateman, acting in conspiracy and combination with Village President Nancy Smith, advised Mr. Hecht that if his clients sought a judicial determination of the validity of the Special Service Area ordinances, then Bateman was authorized by Smith and the Village to file an action for damages against the Cross-Respondents. Allegedly, in response to Bateman's threat to file suit, the Cross-Respondents decided to take no action to ascertain the validity of the Special Service Area ordinances. On January 5, 1993, the Village commenced this litigation by filing its Complaint for declaratory relief, seeking a declaration of the validity of the Special Service Area ordinances, and for damages for tortious interference with contract and tortious interference with prospective advantage.

In its opinion reversing the Circuit Court, the Illinois Appellate Court ruled that Village President Nancy Smith was clothed with official, qualified immunity from suit for money damages on the Cross-Respondents' claims of deprivation of their First Amendment rights. However, the Illinois Appellate Court ruled that the same official immunity should not be extended to James P. Bateman, the Village Attorney. In reversing the Circuit Court, the Illinois Appellate Court also held that the Village's claims for tortious interference with contract and for tortious interference with prospective advantage constituted "sham" litigation.

ARGUMENT

I.

THE ILLINOIS APPELLATE COURT IMPROPERLY REFUSED TO APPLY TO VILLAGE ATTORNEY JAMES BATEMAN OFFICIAL, QUALIFIED IMMUNITY.

A.

In *Harlow v. Fitzgerald*, 475 U.S. 800, 102 S.Ct. 2727 (1982), this Court held that "government officials performing discretionary functions, generally are shielded from liability from civil damages insofar as their conduct does not violate clearly-established statutory or constitutional rights of which a reasonable person would have known". (*Id.*, 475 U.S. at 818, 102 S.Ct. at 2738). However, before addressing the question of whether the constitutional right at issue is clearly-established, the threshold inquiry is whether the plaintiff has alleged the violation of a constitutional right at all. *Siegert v. Gilley*, 500 U.S. 226, 111 S.Ct. 1789 (1991).

The Illinois Appellate Court improperly concluded, without any level of scrutiny, that the Cross-Respondents had sufficiently pleaded an actionable claim for deprivation of their First Amendment right to petition the courts, as a result of Village Attorney Bateman's threat to file a claim for damages against them.

This Court has observed that the First Amendment right to petition the government for redress of grievances is "cut from the same cloth as the other guarantees [of the First Amendment], and is an assurance of a particular freedom of expression". *McDonald v. Smith*, 472 U.S. 479, 105 S.Ct. 2787, 2789 (1985). Thus, courts must analyze an alleged violation of the petition clause "in the same manner as any other alleged violation of the right to engage in free speech". *Phares v. Gustafsson*, 856 F.2d 1003, 1009 (7th Cir. 1988). The mere filing of a lawsuit is not necessarily and always protected by the First Amendment. *Yatvin v. Madison Metropolitan School District*, 840 F.2d 412 (7th Cir. 1988).

In deciding whether the Cross-Petitioner had wrongfully deprived the Cross-Respondents of any protected right to petition the government, the first inquiry must be whether the petition touched upon a matter of public concern, by looking at the content, form and context of the given statement, speech or petition. See, *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 1690 (1983). If the speech or petition can be fairly characterized as addressing a matter of public concern, then one proceeds to the *Pickering* balance test to determine whether the interest of the governmental entity outweighs the Cross-Respondents' First Amendment rights. *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563, 88 S.Ct. 1731 (1968). The Cross-Respondents

do not mean to suggest that the same level of scrutiny should apply when a governmental entity allegedly seeks to regulate speech or conduct of the citizenry in general, compared to when it acts in its capacity as an employer. The point is that, if the Cross-Respondents' petition to the Court did not address matters of public concern, then they have alleged no deprivation of any First Amendment right.

In the case at bar, there can be no scrutiny of the content of the petition which the Cross-Respondents threatened to file against the Village, as there was no allegation in the Amended Counter-Complaint that Attorney Hecht had ever provided Village Attorney Bateman with a copy of the threatened petition, and there is no allegation that Hecht had ever informed Village Attorney Bateman of the content of, or basis for, the Cross-Respondents' petition. There was no allegation that the Cross-Respondents' threatened complaint/petition would have contained the advancement of political ideas or would have contained claims of official graft, corruption, malfeasance, or the like. Taking into account the context of the discussions in which Attorney Hecht had threatened to file suit, and taking into account the timing of that threat to file suit, it was reasonable for Village Attorney Bateman to conclude that the point of the Cross-Respondents' threat to file suit was made only to prevent the Village from closing on the sale of the bonds, in order to protect their own private interests, as property owners within the Special Service Area, apparently because they did not want to incur the property tax increases resulting from the creation of the Special Service Area. It was also reasonable for Village Attorney Bateman to conclude that the Cross-Respondents' threatened lawsuit would have

been a baseless one, at least in the sense that the Village had passed a lawful ordinance which created a valid Special Service Area. (Even though the Illinois Appellate Court has ruled that the Loiacono parcel must be excluded from the Special Service Area, the Cross-Respondents' threatened suit to attack the validity of the creation of the entire Special Service Area). One has no constitutional right to file baseless litigation. *Yatvin v. Metropolitan School District, supra*, 840 F.2d at 419.

Applying an appropriate balancing test, even if one were to conclude that the Cross-Respondents' threatened lawsuit would have addressed matters of public concern, it is clear that the Village was acting to protect the contract for the sale of $6,000,000.00 in bonds and to protect in excess of $450,000.00 in expenditures for engineering services, administration costs, bond printing costs, and the like. The Village had a substantial interest in protecting the public treasury and the interests of its taxpaying citizens, relative to the substantial sums that had already been expended. Moreover, relative to Village Attorney Bateman's statement that he was authorized to file a claim for damages against the Cross-Respondents, in response to their threat to file a lawsuit contesting the validity of the Special Service Area ordinances, the Cross-Respondents had no constitutional right to be unopposed in their lawsuit, nor did they have any constitutional right to be free from a counterclaim for damages. *Reichenberger v. Pritchard*, 660 F.2d 280, 285 (7th Cir. 1981).

The Cross-Respondents failed to allege any facts in their First Amended Counter-Complaint tending to establish that there has been any actual, objective, chilling effect on their speech or other protected activities, as

a result of Village Attorney James Bateman's statement that he was authorized by the Village to file an action for damages against them. Absent a showing of objective harm or a specific, threatened, future harm, any claimed chill is merely subjective, and therefore, not actionable. *Laird v. Tatum*, 408 U.S. 1, 92 S.Ct. 2318, 2325-26 (1972). Absent the pleading of any specific adverse effects, the "chill" claimed by the Cross-Respondents is merely subjective. The mere possibility of a remote or speculative future injury or invasion of rights will not suffice to state a claim under 42 U.S.C. §1983. *Reichenberger v. Pritchard*, *supra*, 660 F.2d at 285. The facts asserted in the Cross-Respondents' Amended Counter-Complaint simply failed to set forth how, if at all, the Cross-Respondents' expressive, political or business activities were interrupted by Mr. Bateman's statement that the Village had authorized him to file an action for damages against them.

In its opinion, the Illinois Appellate Court simply assumed that the Cross-Respondents had adequately pleaded a claim for deprivation of their First Amendment rights. The Illinois Appellate Court was bound to apply some reasonable level of scrutiny to the Cross-Respondents' alleged deprivation of their First Amendment rights, inasmuch as the *Pickering* balance test requires full consideration of the government's interest in effective and efficient fulfillment of its responsibilities to the public. *Connick v. Myers*, *supra*, 103 S.Ct. at 1692. Just as importantly, the Illinois Appellate Court failed to address the issue of whether the Cross-Respondents had sufficiently pleaded facts tending to establish that they sustained any actual, objective chilling effect on their right to petition. Had the Cross-Respondents wished to file a

complaint in the Circuit Court attacking the validity of the Special Service Area ordinances, then the claimed statements made by Village Attorney James P. Bateman did nothing to deprive the Cross-Respondents of adequate, effective, and meaningful access to the Court.

B.

In their First Amended Counter-Complaint, the Cross-Respondents alleged that Village President, Nancy Smith, and Village Attorney, James P. Bateman, acted in agreement, combination and conspiracy, to deprive them of their First Amendment right to petition the court.

The Illinois Appellate Court concluded that Village President Nancy Smith is entitled to qualified immunity. On the basis of that finding, the Illinois Appellate Court, *a fortiori*, determined that Ms. Smith's actions, as alleged in Count I of the First Amended Counter-Complaint, did not violate any clearly-established, constitutional right of the Cross-Respondents. Specifically, the Illinois Appellate Court stated as follows:

> "Governmental officials performing discretionary functions generally are shielded from liability from civil damages insofar as their conduct does not violate clearly-established statutes or constitutional rights of which a reasonable person would have known." (Citation omitted).
>
> . . .
>
> "Applying these standards, we find that a reasonable Village President would have relied on the advice of the Village Attorney that the course of conduct the Village was pursuing was proper and legal, and thus we find immunity applies to Smith. However, we find that in light of the pre-existing law the immunity does not extend to Attorney Bateman. Thus,

> we conclude that the trial court properly dismissed Count I of the Defendants' counterclaim as it pertains to Smith, but erred in dismissing that claim as it pertained to Bateman." (App., pp. _____).

Because Village President Smith is protected with official, qualified immunity from suit, Village Attorney Bateman must be clothed with the same immunity. If it were reasonable for Smith to conclude that the course of conduct that the Village was pursuing was legal, then it was reasonable for Village Attorney Bateman to reach the same conclusion. If Village President Smith violated no clearly-established right of the Cross-Respondents, then Village Attorney Bateman violated no such right.

As this Court observed, in *Davis v. Scherer*, 486 U.S. 183, 104 S.Ct. 3012, 3017 (1984):

> "*Harlow v. Fitzgerald, supra*, rejected the inquiry into state of mind in favor of a wholly objective standard. Under *Harlow*, officials 'are shielded from liability for civil damages insofar as their conduct does not violate clearly-established statutory or constitutional rights of which a reasonable person would have known.' (Citation omitted). Whether an official may prevail in his qualified immunity defense depends upon the 'objective reasonableness of [his] conduct as measured by reference to clearly-established law.' (Citation omitted). No other 'circumstances' are relevant to the issue of qualified immunity."

It matters not whether the purely objective standard of qualified immunity is applied to the President of the United States, the U.S. Attorney General, the Governor of Illinois, a judge, the President of the Village of Lake Barrington, or the Lake Barrington Village Attorney. The purely objective analysis is the same and the question is simply whether a reasonable official could have con-

cluded that his act violated no clearly-established statutory or constitutional right of the Plaintiffs. This Court has stated that the principal qualified immunity established by its decisions is to be applied "across the board". *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 3042 (1987).

In reaching its decision, the Illinois Appellate Court has imposed a subjective analysis into the question of the qualified immunity defense, by finding that, because she is Village President, Nancy Smith is entitled to the immunity, but that, because he is an attorney, Village Attorney James P. Bateman is not entitled to be clothed with the same immunity. By adopting this analysis, the Appellate Court has contravened the long-standing, purely objective test established by this Court in *Harlow v. Fitzgerald*, *supra*, and its prodigy.

It is the Plaintiffs' burden to show that the Defendant's actions violated a right that was clearly-established at the time of the conduct at issue. *Davis v. Scherer*, *supra*, 104 S.Ct. at 3021. This standard requires a plaintiff to offer closely analogous case law or evidence that the Defendant's conduct is so patently violative of the constitutional right that reasonable officials would know of the violation without guidance from the courts. *Burns v. Reed*, 44 F.3d 524 (7th Cir. 1995). Government officials are not expected to be prescient, and they are not liable for damages simply because they legitimately, but mistakenly believe that the balancing of interests tipped in their favor. *Gregorich v. Lund*, 54 F.3d 410, 415 (7th Cir. 1995).

In order for the law to be considered "clearly-established", there must be "case law which *clearly* and *consistently* recognized the constitutional right". *Lojuk v. John-*

son, 770 F.2d 619, 628 (7th Cir. 1985) (emphasis added). One cannot make the broad, general statement that the First Amendment right to petition the courts was clearly-established. Both this Court and the Seventh Circuit have made clear that, if the constitutional right at issue is defined too broadly, the immunity would never be available. Rather, qualified immunity is fact-specific and fact-sensitive. In *Anderson v. Creighton*, *supra*, this Court stated:

> "It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly-established' in a more particularized, and hence more relevant, sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful (citation omitted); but it is to say that in light of pre-existing law, the unlawfulness must be apparent." (*Id.*, 107 S.Ct. at 3039).

Even before *Anderson*, *supra*, in this Circuit, Judge Richard Posner had observed:

> "[The *Harlow*] test would have little bite if a right 'clearly-established' *at any level of generality* could survive it. The words 'clearly-established . . . constitutional rights' may not be used to read the defense of immunity out of federal tort law by the facile expedient of stating constitutional rights in the most general possible terms, so that anyone who prevails on the merits of a claim based on (for example) the First Amendment's free exercise of religion clause, however novel that claim is, can defeat the defense of immunity simply by pointing out that the right to the free exercise of one's religion has long been a clearly-

established constitutional right. The right must be sufficiently particularized to put potential defendants on notice that their conduct is probably unlawful." (*Azeez v. Fairman*, 795 F.2d 1296, 1301 (7th Cir. 1986). *Colaizzi v. Walker*, 812 F.2d 304, 307-308 (7th Cir. 1987)).

In the context of a First Amendment claim, whenever balancing of interests is required, "the facts of the existing case law must closely correspond to the contested action before the defendant official is subject to liability under [*Harlow*]". *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir. 1986). Therefore, "[Q]ualified immunity typically casts a wide net to protect government officials from damage liability *whenever balancing is required*", inasmuch as "the particularized balancing required by *Pickering* is difficult for even the judiciary to accomplish". *Id.*, 786 F.2d at 276 (emphasis added).

Thus, in the First Amendment setting, the court must take into account the totality of the circumstances and all of the facts pleaded, including what the Cross-Respondents and their attorney, Hecht, said and the form and context of those expressions.

It is submitted that it would have been objectively reasonable for any Village official to have concluded that the Cross-Respondents' motivations were purely personal, especially inasmuch as the time for mounting a legally sufficient objection to the Special Service Area ordinances, as prescribed by Illinois law, had elapsed, and inasmuch as the Cross-Respondents (through Hecht) threatened to file suit attacking the validity of the ordinances immediately prior to the date set for the bond sale closing.

At the second level of inquiry, it is submitted that it would have been objectively reasonable for any Village official to have concluded that, taking into account the vast, substantial sums that had already been expended by the Village and its tax-paying citizens, the Village had a substantial interest to protect. Moreover, it would have been reasonable for any Village official to conclude that the needed improvements and the substantial sums already expended therefor outweighed the purely private, personal motivation of the Cross-Respondents.

With respect to the context and form of the Cross-Respondents' threat to file suit to contest the validity of the Special Service Area ordinances and considering the timing of the Cross-Respondents' threat (i.e. after the statutory period for filing of objections had elapsed), any Village official could have reasonably concluded that the Cross-Respondents were merely threatening baseless, bad faith litigation, taking into account established law in this Circuit. *Yatvin v. Metropolitan School District*, 840 F.2d 412 (7th Cir. 1988).

Taking into account the state of the law at the time of the acts alleged in the Cross-Respondents' First Amended Counter-Complaint, any Village official could have reasonably concluded that, as a local governmental body, the Village of Lake Barrington itself possessed the First Amendment right to petition the courts for redress of grievances under the *Noerr-Pennington* doctrine. *California Motor Transport Company v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609 (1972); *Township of River Vale v. Town of Orangetown*, 403 F.2d 684 (2nd Cir. 1968); *Monarch Entertainment Bureau, Inc. v. New Jersey Highway Authority*, 715 F.Supp. 1290 (Dist. Ct. N.J. 1989).

At the time when the Village filed its complaint for declaratory relief and for damages, and at the time when Village Attorney James P. Bateman made the alleged threat to file that action, any Village official could have reasonably concluded that there existed a "reasonable basis" for the Village's action and that the action was not a "sham". See, *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 371, 103 S.Ct. 2161, 2170 (1983). (There has never been an allegation, nor even a suggestion, that the Village's complaint contained any false allegations of fact). Moreover, any Village official could have reasonably concluded that there was some "realistic chance" that the Village's legal theory "might be adopted". *Id.*, 103 S.Ct. at 2172. (Although, after the fact, the Illinois Appellate Court wrongly concluded that the Village's claims for damages were a "sham", the Cross-Respondents never presented a single case to the Circuit Court or the Appellate Court which stood for the contention that the conditional privilege possessed by an attorney insulates his clients from liability for the clients' tortious conduct). The point is that, taking into account the then existing state of the law, a Village official could have reasonably concluded that the Village's action was lawful, even if it had been brought, as alleged, with a retaliatory intent. *Id.*, 103 S.Ct. at 2170.

It is submitted that any Village official could have reasonably concluded that the Village's alleged threatened lawsuit, and its lawsuit filed on January 5, 1993 would have no actual chilling effect on the Cross-Respondents' claimed right of access to the court, because the Cross-Respondents could have reasonably been expected to assert their (baseless) challenge to the Special Service Area as a counterclaim in the Circuit Court of Lake County.

Because any First Amendment right at issue herein involves balancing the respective interests of the parties, Cross-Petitioner James P. Bateman is entitled to be clothed with the broad, wide net of qualified immunity, applying the purely objective standard of the immunity, as required under *Harlow*.

CONCLUSION

For the foregoing reasons, this Court should grant this Cross-Petition, as this Court has jurisdiction to do so under the collateral order doctrine as set forth in *Mitchell v. Forsyth*, *supra*. The requested writ must be issued in order to insure that the courts of Illinois, and all other states, do not contravene this Court's holding in *Harlow v. Fitzgerald*, *supra*, by injecting a subjective component into the question of official, qualified immunity.

Respectfully submitted,

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